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SHOW

PROCEEDINGS AND ORDERS

DATE: [04/06/88]

CASE NBR: [87101010] [CFX]
CASE STATUS: [ ]
SHORT TITLE: [Taylor, Ida J.]
VERSUS [United States] DATE DOCKETED: [11 1987]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Nov 19 1987		Petition for writ of certiorari filed.
Jan 20 1988		Order extending time to file response to petition until February 20, 1988.
Feb 19 1988		Brief of respondent United States in opposition filed.
Feb 24 1988		DISTRIBUTED. March 18, 1988
Mar 21 1988		REDISTRIBUTED. March 25, 1988
Mar 28 1988		REDISTRIBUTED. April 1, 1988
Apr 4 1988		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

87 1010

No._____

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1987

IDA J. TAYLOR
Petitioner,
vs

UNITED STATES OF AMERICA,
(Department of the Army
Letterman Army Medical Center)
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

Gerald C. Sterns
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No._____

IN THE SUPREME COURT
OF THE
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October Term, 1987

IDA J. TAYLOR
Petitioner,

vs

UNITED STATES OF AMERICA,
(Department of the Army
Letterman Army Medical Center)
Respondent.

QUESTION PRESENTED FOR REVIEW

Whether a special interest statute which limits general damages in certain cases constitutes an affirmative defense which must be pleaded timely or deemed waived.

PARTIES TO THE PROCEEDING BELOW

Ida Taylor, plaintiff/petitioner; Iris Taylor and Tracy Taylor, parties to the original action until dismissed by order of the trial court; The United States of America, defendant/respondent; California Medical Association and California As-

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TABLE OF AUTHORITIES

OPINIONS OF THE COURT BELOW

On January 22, 1986, the United States District Court for the Northern District of California, Judge Aguilar, entered Judgment in this case in favor of Ida Taylor and against the United States in the amounts of $100,000 for general damages for emotional distress and $400,000 for general damages for loss of consortium. See Appendix. On that same date, the District Court issued Findings of Fact and Conclusions of Law determining, *inter alia*, that "the government has stipulated to liability for all consequences . . ." See Appendix at 38.

Thereafter, defendant United States government sought reconsideration and post-trial relief from the amount of the award, raising for the first time the issue of statutory limitation on damages. On March 6, 1986, the District Court ruled from the bench(Transcript of Proceedings at 6):[1]

> Nowhere was there any evidence or argument presented to the Court as to how or in what manner the government intended to limit the intent of its stipulation as to liability or as to what theories of recovery it was limiting its liability.
>
> The court did not approach this as a medical malpractice or medical negligence claim, but only one of common law negligence, a failure of a duty of care which was owed to a person such as Mr. Taylor and as Mrs. Taylor, his spouse, and a percipient witness of what had occurred as a result of that negligence. Accordingly, the Court made its findings with respect to general damages as a result of that.

[1]See Appendix, at 43.

Good cause appearing therefore, the court denies the government's motion for reconsideration and post-trial relief.

Defendent government appealed to the Ninth Circuit, which, on July 16, 1987, issued an opinion published at 821 F.2d 1428, holding that the statutory limitation of damages raised by defendant in its post-trial motion "is a limitation of liability, not an affirmative defense," and, as such, was raised "at a pragmatically sufficient time" so as not to waive its protection. See Appendix at 26-27.

Plaintiff's petition for rehearing was denied by the Ninth Circuit on September 15, 1987. See Appendix at 30.

GROUNDS ON WHICH JURISDICTION IS INVOKED

A decision issued in this matter on July 16, 1987, from the United States Court of Appeals for the Ninth Circuit and a final order denying rehearing was filed September 15, 1987. Said decision and order are in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingraham v. United States*, 808 F.2d 1075 (1987), on the issue of whether a statutory limitation of liability is an affirmative defense which must be timely raised or deemed waived. See Rule 17 of the Supreme Court of the United States.

Certiorari is sought pursuant to 28 U.S.C. §1254.

PERTINENT AUTHORITY

Rule 8(c) of the Rules of Civil Procedure provides in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction . . . and

> any other matter constituting an avoidance or affirmative defense.[2]

California Civil Code §3333.2(a) and (b) provide:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
>
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars.

STATEMENT OF THE CASE

This action was originally brought in the United States District Court against defendant United States pursuant to 28 U.S.C. §1346(b), the Federal Tort Claims Act. It involves a claim against the United States government for personal injury as a result of government negligence. A judgment was awarded Mrs. Ida J. Taylor in the amount of $500,000 for her emotional distress and loss of consortium as a result of an incident at defendant's Letterman Army Medical Center in which her husband was rendered permanently comatose after being disconnected from his ventilator for an unknown period of time.

Defendant government stipulated to liability, without reservation or restriction, and only damages were litigated at trial. The issue of a statutory limitation on damages was never raised until after the court issued its judgment. Then, for the first

[2]See Appendix at 45 for complete text

time, defendant claimed that this was a medical malpractice case and that under California Civil Code §3333.2 non-economic damages in medical malpractice cases are limited to $250,000.

The Ninth Circuit ultimately ruled that defendant had not waived any statutory limitation of damages by failing to raise the issue until after judgment. The Ninth Circuit claimed that, although the only California case law on the subject indicates to the contrary, California Civil Code §3333.2 is a limitation of damages rather than an affirmative defense. This puts the Ninth Circuit in direct opposition to the Fifth Circuit, which held in *Ingraham v. United States*, *supra*, 808 F.2d at 1079, that "the Texas statutory limit on medical malpractice damages is an affirmative defense which must be pleaded timely" or be deemed waived.

ARGUMENT

The Ninth Circuit held in *Taylor* that a special interest statute designed to limit liability in medical malpractice cases is not an affirmative defense. 821 F.2d at 1433. Such a holding is unprecedented. It is in conflict with the law of both the Fifth and the First Circuits, and it is contrary to the only relevant interpretation of the law by California appellate courts.

Because it disregards the only known California appellate opinion on the subject, the Ninth Circuit's holding in *Taylor* is violative of the *Erie v. Tomkins* doctrine, set out at 304 U.S. 64, 80 (1938), which provides that State law as announced by the highest court of the State is to be followed—even on underlying issues—and that if there is no pronouncement from the State's highest court, the Federal court must apply what it finds to be the law of the State.

In this instance, the Ninth Circuit was presented with a situation in which plaintiff argued that defendant's failure to

raise the protection of California Civil Code §3333.2 as an affirmative defense amounted to a waiver of the right to claim the protection the statute affords certain selective interests (*i.e.*, health care providers). The Ninth Circuit acknowledged that "[w]hether §3333.2 is an affirmative defense is a question of state law." 821 F.2d at 1433. It acknowledged that the only recorded California decision on this point is *Pressler v. Irvine Drugs, Inc.*, 169 Cal.App.3d 1244, 1248 (1985); and it acknowledged that *Pressler* describes the damage limitation of §3333.2 as an affirmative defense (821 F.2d at 1433). It then completely disregarded *Pressler* and made no attempt whatsoever at an analysis of California law on the subject. (*Id.*)

In *Commissioner v. Bosch*, 387 U.S. 456, 465 (1967), this Court declared that when there is no decision by a State's highest court on a particular issue, "federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the state." Clearly, no regard whatsoever was given *Pressler* by the Ninth Circuit. See 821 F.2d at 1433. Nor was any attempt made to assess what the California Supreme Court would do with this issue. Clearly, this was error. Compare, *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91, 95-96 (1976).

The Ninth Circuit also erred in characterizing §3333.2 as a limitation of damages rather than an affirmative defense without inquiring as to whether statutes which function as a limitation of damages are affirmative defenses under California law. In this same vein, the Ninth Circuit missed the point that nearly all affirmative defenses limit a defendant's liability.

For example, the defense of failure to mitigate damages functions as a limitation of damages but is an affirmative defense under California law. In fact, in *999 v. C.I.T.*

Corporation, 776 F.2d 866 (1985), this very same circuit acknowledged as much, stating (at 870 n.2):

> CIT failed to raise mitigation of damages as an affirmative defense in its pleadings, which ordinarily would constitute a waiver of that defense. See *Mayes v. Sturdy Northern Sales, Inc.*, 91 Cal.App.3d 69, 86, 154 Cal.Rptr. 43, 54 (1979); Fed.4.Civ.P. 8(c); 5 C. Wright & A. Miller, *Federal Practice and Procedure*, §1273, at 322 (1969 & Supp. 1985). However, the issue of mitigation was included in the pre-trial order, which has the effect of amending the pleadings. *Federal Deposit Ins. Corp. v. Glickman,* 450 F.2d 416, 419 (9th Cir. 1971).

Not only did the Ninth Circuit in *999* regard as an affirmative defense a matter which functions as a limitation of damages, but it also relied on the ruling of an intermediate California court in so doing—something it specifically refused to do in *Taylor* when it shunned *Pressler*. See 821 F.2d at 1433.

Finally, in reaching the conclusion that it did, the Ninth Circuit placed itself squrely at odds with the other circuits which have addressed this issue. For example, the Fifth Circuit in *Ingraham v. United States, supra,* 808 F.2d at 1078, when presented with Texas' similar statutory limitation of damages in medical malpractice actions, declared:

> Appellees maintain that we should not consider the statutory limitation of liability invoked on appeal because it is an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, and the failure to raise it timely constitutes a waiver. We find this argument persuasive.

The basis of this persuasion was the Fifth Circuit's recognition that Rule 8(c), setting out affirmative defenses, is a living provision which contains the residuary clause "any other matter constituting an avoidance or affirmative defense." The Fifth Circuit listed a score of affirmative defenses not specifically listed in Rule 8(c), citing 5 C. Wright and A. Miller, *Federal Practice and Procedure: Civil,* §1271 (1969 & Supp.) 808 F.2d at 1078.

As to whether a statutory limit on medical malpractice damages qualifies as an affirmative defense, the Fifth Circuit noted (*id.* at 1079):

> Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to "lie behind a log" and ambush a plaintiff with an unexpected defense.

In the *Taylor* case, this is exactly what happened, as can be seen from the trial judge's remarks at the hearing on defendant's post-trial motion, quoted *supra* at 2-3. The issue of medical malpractice never arose before judgment. Defendant had stipulated to liability across the board and the exact nature of the occurrence which injured Theodore Taylor was thus saved from disclosure by defendant. When defendant raised the claim of medical malpractice after trial, plaintiff still did not get a chance to explore whether this truly was an issue of malpractice because defendant's claim was promptly denied. Thus, defendant lay behind a log until it reached the appellate court, and then benefitted from the defense without ever having to prove its predicate fact situation and without allowing plaintiff the opportunity to disprove it.

In further consideration of whether a limitation on malpractice damages constitutes an affirmative defense, the Fifth Circuit noted in *Ingraham* (808 F.2d at 1079):

> We view the limitation on damages as an "avoidance" within the intendment of the residuary clause of 8(c). Black's law Dictionary, 5th ed. 1979, defines an avoidance in pleadings as "the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading shows cause why they should not have their ordinary legal effect." Applied to the present discussion, a plaintiff pleads the traditional tort theory of malpractice and seeks full damages. The defendant responds that assuming recovery is in order under the ordinary tort principles, because of the new statutory limitation, the traditional precedents "should not have their ordinary legal effect."

Thus, in direct opposition to the faultily-reasoned holding of the Ninth Circuit in *Taylor*,[3] the Fifth Circuit held (*id.*):

> [W]e conclude that the Texas statutory limit on medical malpractice damages is an affirmative defense which must be pleaded timely and that in the cases at bar the defense has been waived.

---

[3]Note, for example, the Ninth Circuit's blundering statement that, "[u]nlike affirmative defenses listed in Fed. R. Civ. Proc. 8(c), §3333.2 limits, but does not bar recovery for noneconomicdamages." 821 F.2d at 1433. Does contributory neglience bar recovery? Not in California. *Li v. Yellow Cab*, 13 Cal.3d 804, 825 (1975).

In agreement with the Fifth Circuit is the First Circuit in *Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1975), which likewise held that a state statutory limitation on tort damages is an affirmative defense which was waived because not timely pleaded:

> While a statutory limitation on liability is not enumerated among the listed defenses of Rule 8(c) of the Federal Rules of Civil Procedure, we think it falls within the Rule's residuary clause.

In the case at bar, the Ninth Circuit admits that Federal Rule of Civil Procedure 8(c) requires defendants to plead affirmative defenses in answer to plaintiff's complaint. 821 F.2d 1432. It admits that defenses not so raised are waived. *Id.* It just refuses to admit that a statutory limit on medical malpractice cases is an affirmative defense. In so refusing, it stands alone, in conflict with the other circuits, and with the State law it is supposed to be applying.

CONCLUSION

Certiorari should be granted and the order and opinion of the Ninth Circuit set aside.

DATED: December 8, 1987.

LAW OFFICES OF
STERNS & WALKER

By_____

Gerald C. Sterns
Walter H. Walker, III
Attorneys for Petitioner

APPENDIX

1. Opinion of Ninth Circuit, July 16, 1987
2. Order of Ninth Circuit Denying Rehearing, September 15, 1987
3. Judgment of U.S.D.C., N.D. CA, January 22, 1986
4. Findings of Fact and Conclusions of Law of U.S.D.C., N.D. CA, January 22, 1986
5. Oral opinion and ruling of U.S.D.C., N.D. CA, on defendant's motion for reconsideration and post-trial relief, March 6, 1986.
6. Rule 8(C)

Appendix 1

For Publication
United States Court of Appeals
For the Ninth Circuit

Ida J. Taylor, Iris Taylor, Tracy Taylor, by and through her Guardian ad Litem, Ida J. Taylor,
Plaintiffs-Appellees,

v.

United States of America (Department of the Army Letterman Army Medical Center),
Defendant-Appellant.

California Medical Association and California Association of Hospitals and Health Systems
Amici Curiae.

No. 86-2025
D.C. No.
CV-85-0076-RPA
Opinion

Argued and Submitted
June 9, 1987 - San Francisco, California

Filed July 16, 1987

Before: Alfred T. Goodwin, Robert R. Beezer and David R. Thompson, Circuit Judges.

Opinion by Judge Beezer

Appeal from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Summary

Governmental Torts

Appeal from award of noneconomic damages. Reversed and remanded.

This action arises from an award of $500,000 to appellee Taylor for loss of consortium and emotional distress. Taylor's husband sustained permanent brain damage while receiving medical treatment at Letterman Army Hospital when he became disconnected from his ventilator. Taylor filed suit under the Federal Tort Claims Act. The government stipulated to liability for the incident. California Civil Code section 3333.2, as incorporated by the Federal Tort Claims Act, limits recovery for noneconomic injuries in actions based on professional negligence to $250,000. Taylor claims that the government waived the protection of section 333.2 by failing to raise the issue before judgment.

[1] In this case, California law determines the nature and extent of the government's liability for Taylor's injuries. [2] In an earlier opinion, this court assumed without discussion that section 3333.2 applies to actions brought against the United States for professional negligence. [3] Other circuits considering this question have concluded that liability limitations similar to section 333.2 apply to the United States, even though the statutes purport to apply only to state-licensed health care providers. [4] the only reason that Letterman Army Hospital and its staff are not licensed under California law is that California lacks power to require licensing of federal health care providers and physicians. [5] The California courts have concluded that a hospital's negligent failure to correct unsafe conditions in the hospital constitutes professional negligence. [6] Taylor's husband was under the care of government physi-

cians at the time of the incident, the injury occurred in the hospital, and the injury was caused by removal of medical equipment integral to treatment. [7] The government had a professional duty to prevent Taylor's husband from becoming separated from his ventilator. [8] Section 3333.2 is a limitation of liability. It limits, but does not bar recovery for noneconomic damages. [9] Section 3333.2 requires no additional factual inquiry. Taylor's husband's injuries unquestionably arose from professional negligence for which the government admits responsibility. Taylor suffered no prejudice due to the government's delay in raising section 3333.2.

Counsel

Irene M. Solet, Washington, D.C., for the appellant.

Walter H. Walker, III, San Francisco, California, for the appellee.

Frederic D. Cohen and S. Thomas Todd, Encino, California, for the *amici curiae*.

Opinion

BEEZER, Circuit Judge:

The United States appeals from judgment awarding Ida Taylor $500,000 in damages for loss of consortium and emotional distress. Taylor's husband sustained permanent brain damage while receiving medical treatment at Letterman Army Hospital. California Civil Code §3333.2, as incorporated by Federal Tort Claims Act, limits recovery for noneconomic injuries in actions based on professional negligence to $250,000. Because the

underlying injuries to Taylor's husband occurred in the hospital and during the course of medical treatment, we reverse the judgment and remand with directions to reduce noneconomic damages awarded to Taylor in accordance with §3333.2.

I Background

Taylor's husband suffers from amyotrophic lateral sclerosis, or Lou Gehrig's Disease. In July of 1982, Taylor's husband was hospitalized at Letterman Army Hospital for treatment of pneumonia. He depended completely on a ventilator for oxygen. For reasons not part of the record, Taylor's husband became disconnected from the ventilator. As a result of oxygen deprivation, Taylor's husband suffered severe and irreparable brain damage. Taylor herself was present when her husband became disconnected from his ventilator and witnessed efforts to revive him.

The government stipulated to liability for the incident. The only issues at trial were damages for each of Taylor's claims. The district court awarded Taylor $400,000 for loss of consortium and$100,000 for negligent infliction of emotional distress ("*Dillon v. Legg*" [68 Cal.2d 728; 69 Cal.Rptr. 72 (1968)] claim). The government moved, pursuant to Federal Rules of Civil Procedure 59(a), 59 (e) and 60(b), for reduction in damages to $250,000 under California Civil Code §3333.2 ("§33333.2"). The district court concluded that Taylor's claims were based on ordinary "common law" negligence rather than professional negligence, and that §3333.2 did not apply.

Taylor claims that the government waived the protection of §3333.2 by failing to raise the issue before judgment. The government denies waiver. The government argues that Taylor's claims are necessarily predicated on professional, not ordinary common law negligence, and that §3333.2 applies. In the alternative, the government claims that damages awarded

Taylor were excessive and warrant reduction. The California Medical Association and the California Association of Hospital and Health Systems filed an amicus brief in support of the government.

II Discussion

A. Applicability of California Civil Code §3333.2

[1] The Federal Tort Claims Act ("FTCA") provides that the government "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. §2674. Liability is to be determined "in accordance with the law of the place where the [negligent] act or omission occurred." 28 U.S.C. §1346. In this case, the negligent act occurred in California. Accordingly, California law determines the nature and extent of the government's liability for Taylor's injuries. See *Shaw v. United States*, 741 F.2d 1202, 1205 (9th Cir. 1984). Whether §3333.2 limits noneconomic damages recoverable by Taylor is a question of law, which this Court reviews de novo.[1]

California enacted §3333.2 as part of the Medical Injury Compensation Reform Act ("MICRA) in 1975. Section 3333.2 provides, in part

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Taylor claims that §3333.2 does not apply to her action because 1) the United States is not a health care provider within the meaning of §3333.2(c)(1), and 2) her claim is based on ordinary "garden-variety" negligence, not on professional negligence, as required by §3333.2(c)(2).[2]

1. Section 3333.2 Applies To Actions Against The United State

Section 3333.2 applies to "any action for injury against a health care provider." Cal. Civ. Code §3333.2(a). Subsection (c)(1) defines "health care provider" as any person, clinic, health dispensary, or health facility licensed by the State. Taylor claims that the United States is not a health care provider because the United States is not licensed by California to operate Letterman Army Hospital.

[2] In *Hoffman v. United States*, this Court held §3333.2 constitutional as applied in suits against the United States for professional negligence. 767 F.2d 1431 (9th Cir. 1985). This Court reversed the district court judgment and remanded with directions "to amend the judgment to limit the noneconomic damages to $250,000." Id. at 1437. *Hoffman* assumed without discussed that §3333.2 applies to actions brought against the United states for professional negligence. We hold that §3333.2 applies to such actions.

[3] Other circuits considering this question have concluded that liability limitations similar to §3333.2 apply to the United States, even though the statutes purport to apply only to state-licensed health care providers. See *Lucas v. United States*, 807 f.2d 414, 417 (5th Cir. 1986); see also *Scheib v. Florida Sanitarium and Benevolent Association*, 759 F.2d 859, 863-64 (11th Circ. 1985).

Private hospitals in California must be licensed under division

2 of the California Health and Safety Code. Physicians must be licensed under provisions of the Health and Safety or Business and Professions Code. Had Taylor's husband suffered identical injuries while under the care of a private institution in California, §3333.2 would limit recovery for noneconomic damages to $250,000.

[4] The only reason that Letterman Army Hospital and its staff are not licensed under California law is that California lacks power to require licensing of federal health care providers and physicians. The United States has, by virtue of the Supremacy Clause (Article VI, clause 2), essentially deemed Letterman Army Hospital and its staff fit to provide health care services in California. See *Lucas*, 807 F.2d at 417; see 50 U.S.C. App. §454e (providing for volunteer service of physicians and dentists); see also *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963) (Federal law authorizing practice before United States Patent Office preempts state requirement of membership in state bar); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *United States v. Composite State Board of Medical Examiners*; 656 F.2d 131, 135 & n.4 (5th Cir. 1981). to hold that §3333.2 does not apply to the United States because the United States is exempt from state licensing requirements would contravene Congress' directive that the United States "shall be liable . . . in the same manner and to the same extent as a private individual under the circumstances . . . " 28 U.S.C. §2674. Accordingly, §3333.2 applies to Taylor's action against the United States for damages arising out of negligent treatment of her husband.

2. Taylor's Action Necessarily Arises Out Of Professional Negligence

Section 3333.2 defines professional negligence as

a negligent act or omission to act by a health care provider in the

rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, . . . for which the provider is licensed . . .

The same definition appears in the statute of limitations provision governing actions for medical malpractice. Cal. Code Civ. Proc. §340.5 Under §340.5, "professional negligence" includes "negligent act[s] occur[ing] in the rendering of services for which the health care provider is licensed," irrespective of the level of skill required in the situation resulting in injury. *Murillo v. Good Samaritan Hospital*, 99 Cal.App.3d 50, 57, 160 Cal.Rptr. 33, 37 (1979).

[5] In Murillo, the California Court of Appeals held that "a hospital has a duty 'to use reasonable care and diligence in safeguarding a patient committed to its charge . . . and such care and diligence are measured by the capacity of the patient to care for himself.' " Id. (quoting *Thomas v. Seaside Memorial Hospital*, 80 cal.App.2d 841, 847, 183 P.2d 288, 292 (1947)). Plaintiff in Murillo claimed that hospital personnel negligently failed to raise bedrails on her bed, and that she fell out of bed and was injured as a result. the court concluded that a hosptial's negligent failure to correct unsafe conditions in the hospital constitutes professional negligence. Id. at 37 ("if an unsafe condition of the hospital's premises causes injury to a patient, as a result of the hospital's negligence, there is a breach of the hospital's duty qua hospital.")

[6] There is little evidence concerning the reason that Taylor's husband's ventilator became disconnected. However, Taylor's husband was under the care of government physicians at the time of the incident, the injury occurred in the hospital, and the injury was caused by removal of medical equipment integral to treatment. Finally, treatment for pneumonia is the sort of care which a private hospital in like circumstances would be licensed

to provide.

[7] the government had a professional duty to prevent Taylor's husband from becoming separated from his ventilator, regardless of whether separation was caused by the illconsidered decision of a physician or the accidental bump of a janitor's broom. Civil Code §3333.2 applies to this case.

B. Waiver of Damages Limitation Under §3333.2

Taylor claims that the government waived protection afforded by §3333.2 by failing to raise the issue before judgment. although state substantive law governs in suits brought under the FTCA, Federal Rules of Civil Procedure determine the manner and time in which defenses may be raised and when waiver occurs. See *Perry v. O'Donnel*, 749 F.2d 1346, 1353 (9th Cir. 1984). Federal Rule of Civil Procedure 8(c) requires defendants to plead affirmative defenses in answer to plaintiff's complaint. Defenses not so raised are waived. *Perry*, 749 F.2d at 1353; see In *re Allustiarte*, 786 F.2d 910, 914 (9th Cir. 1986), cert. denied, 107S Ct. 169 (1987).

Whether §3333.2 is an affirmative defense is a question of state law. See *Troxler v. Owens-Illinois Inc.*, 717 F.2d 530, 532 (11th Cir. 1983) (nature of defenses in diversity suit determined by state law). Our analysis indicates that §3333.2 is a limitation of damages rather than an affirmative defense.

In *Pressler v. Irvine Drugs, Inc.*, the California Court of Appeal referred to the damage limitation of §3333.2 as an affirmative defense. 169 Cal.Ap.3d 1244, 1248, 215 Cal.Rptr. 807, 809-10 (1985). Rulings of intermediate state courts are not necessarily conclusive where federal courts apply federal statutes, and state law pertains only to an underlying issue. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). Whether waiver

occurred is a question of federal law under the Federal Rules of Civil Procedure. In addition, jurisdiction derives from the FTCA. The extent of the government's liability is a matter of federal law (28 U.S.C. §§1346(b), 2674), albeit determined according to state standards. The *Pressler* court's characterization of §3333.2 as an affirmative defense does not bind this Court.

[8] Section 3333.2 is a limitation of liability, not a affirmative defense. Unlike affirmative defenses listed in Fed. R. Civ. Proc. 8(c), §3333.2 limits, but does not bar recovery for noneconomic damages. If the Federal Rules do not require plaintiffs to plead the extent of damages sought, defendants should not be required to plead the limitation of damages prescribed by §3333.2. A contrary characterization of §3333.2 would require defendants to anticipate an award of noneconomic damages in excess of $250,000 — a requirement which is unrealistic and inconsistent with the practical notions underlying notice pleading. See Fed. R. Civ. Proc. 8(e), 8(f).

Furthermore, Rul 8(d) specifies that averments as to the amount of damage which defendant does not deny in his answer are not deemed admitted. This provision indicates that the Federal Rules do not consider limitations of damages affirmative defenses, which, by contrast, must be pleaded. Accordingly, the government was not required to raise §3333.2 in its answer.

[9] We recognize, however, that application of §3333.2 may in some instances require resolution of factual issues. [3] In such cases, plaintiffs may be prejudiced if defendants do not raise §3333.2 prior to judgment. We need not decide the question in this case because application of §3333.2 here requires no additional factual inquiry on our part. *Taylor's* injuries unquestionably arose from professional negligence for which the government admits responsibility. *Taylor* suffered no prejudice

due to the government's delay in raising §3333.2. Under these circumstances, we hold that the government raised §3333.2 "at a pragmatically sufficient time" (*Lucas*, 807 F.2d at 417-18) so as not to waive protection of §3333.2.

Conclusion

The district court erred in refusing to reduce noneconomic damages pursuant to §3333.2. the government raised §3333.2 in a timely fashion. We reverse the judgment of the district court and remand with instructions to reduce noneconomic damages awarded Taylor to $250,000.4

Footnotes

[1]Taylor argues for application of the abuse of discretion standard of review, because the government appeals from denial of post trial relief. However, a district court's discretion regarding post-trial motions does not extend to commission of errors of law. Shakey's, Inc. v. Covalt, 704 F.2d 426, 437 (9th Cir. 1983). The operative standard of review for whether §3333.2 applies is de novo.

[2]Neither the parties nor the district court discuss whether §3333.2 applies to actions for noneconomic damages brought by persons other than primary victims of professional negligence. No court has decided the question. However, the California Supreme Court has held that MICRA's statute of limitations (Cal. Code Civ. Proc. §340.5) applies to actions brought by relatives of malpractice victims for emotional distress. Hedlund v. Superior Court, 34 Cal.3d 695, 705, 194 Cal.Rptr. 805, 810 (1983) (victim's son filed timely action under Cal. Code Civ. Proc. §340.5).

Like §3333.2, Cal. Code Civ. Proc. §340.5 applies to "action[s] . . . against a health care provider based upon . . . professional negligence." Cal. Code Civ. Proc. §340.5. application of §3333.2 to actions such as Taylor's furthers the California legislature's purpose of controlling liability associated with medical malpractice. See *Fein v. Permenente Medical Group*, 38 Cal.3d 137, 158-59, 211 Cal.Rptr. 368, 383, appeal dismissed, 106 S. Ct. 214 (1985). Accordingly, we hold that actions "based on professional negligence" include actions brought by relatives of the primary victim for emotional distress and loss of consortium for purposes of §3333.2.

[3]For example, a plaintiff suing a hospital for injuries arising out of separate acts of ordinary and professional negligence may obtain a lump sum award for noneconomic damages in excess of $250,000. Application of §3333.2 may depend on the portion of noneconomic damages attributable to professional negligence compared to the portion attributable to ordinary negligence. Because Taylor's injuries arise out of a single act of professional negligence, we do not decide the appropriate method for application of §3333.2 where several acts combine to produce injuries.

[4]Amici contended that §3333.2 limits total noneconomic damages recoverable in all actions arising out of a single incident of professional negligence to $250,000, rather than $250,000 per action, plaintiff or injury. The government did not raise this argument below, but instead moved that the district court reduce damages awarded to Taylor to $250,000. Accordingly, we do not decide whether §3333.2 limits noneconomic damages to $250,000 per action or $250,000 per incident of professional negligence.

NOT FOR PUBLICATION

FILED

SEP 15 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IDA J. TAYLOR, IRIS TAYLOR, TRACY TAYLOR, by and through her Guardian ad Litem, Ida J. Taylor, Plaintiffs-Appellees, vs. UNITED STATES OF AMERICA (Department of the Army Letterman Army Medical Center), Defendant-Appellant.	)	C.A. No. 86-2025 D.C. No. CV-85-0076-RPA ORDER
CALIFORNIA MEDICAL ASSOCIATION and CALIFORNIA ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS, Amici Curiae.	)	

Before: GOODWIN, BEEZER and THOMPSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

United States District Court
Northern District of California

Ida J. Taylor, Iris Taylor
Tracy Taylor, by and through her
Guardian ad Litem, Ida J. Taylor, No. C-85-0076 RPA

Plaintifs

Judgment

vs.

The United States of America
(Department of the Army Letterman
Army Medical Center)

Defendants.

In accordance with the Findings of Fact and Conclusions of Law filed herein on January 22, 1986, the Court hereby enters Judgment in favor of plaintiff and against the United States as follows:

1. General damages for plaintiff's injury from witnessing the disconnect, in the sum of $100,000.00, plus

2. General damages in the sum of $400,000.00 for all loss of consortium in the past and that likely to be suffered in the future.

Dated: January 22, 1986.

Robert P. Aguilar
United States District Judge

Appendix 4

United States District Court
Northern District of California

Ida J. Taylor, Iris Taylor,
Tracy Taylor, by and through her
Guardian ad Litem, Ida J. Taylor, No. C 85-0076 RPA

Plaintiffs,

vs.

Findings of Fact and Conclusions of Law

The United States of America
(Department of the Army Letterman
Army Medical Center)

Defendants.

The Court, having heard testimony and argument, received and considered exhibits, and evaluated the credibility of the witnesses, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Court incorporates and adopts, in so far as appropriate to the issues herein, the findings of fact entered in *Theodore M. Taylor v. The United States* (Taylor I), Case No. C-83-2854-RPA, January 27, 1984.

2. Finding of Fact Numbers 30, 33, and 34 from the above-referenced *Taylor I* case are not adopted as findings in this case (*Taylor II*).

3. Plaintiff Ida J. Taylor was born January 11, 1945 and is presently 41 years of age.

4. Plaintiff married Theodore M. Taylor, then a United States Army Sargeant, at Ft. Devon, Massachusetts on January 20, 1964 when Plaintiff had just turned 19. They are still husband and wife.

5. Thoedore Taylor and plaintiff had two children, Iris, age 21, and Tracy, age 19.

6. Theodore Taylor was the obvious head of the household and the dominant personality therein.

7. Over her husband's objections, plaintiff returned to the job market in the middle 1970's when both children were established in school.

8. Plaintiff's return to work eventually caused some turmoil and separation between the parties. This dispute was resolved and the parties reconciled their differences.

9. Plaintiff, while working, continued to manage the home and Theodore Taylor remained head of the household.

10. Theodore Taylor was diagnosed in June 1979 as having ALS, and at that time plaintiff terminated her work to take care of him.

11. From the time of their reconciliation and the disconnect, plaintiff and Theodore Taylor had a stable, happy marriage, both enjoying the companionship, affection, support and love of the other.

12. Throughout the marriage plaintiff received continued support, love, affection, companionshio, moral support and guidance and other benefits of the marital relationship from her husband.

13. After Theodore Taylor became progressively disabled by his disease and became bedridden, the marriage relationship became stronger and more fulfilling for plaintiff.

14. The physical relationship of plaintiff and Theodore Taylor, including sexual activity and his ability to help around the home, terminated at some point after Theodore's illness became serious enough for him to be confined to a wheelchair.

15. Prior to the disconnect in July, 1982, Theodore Taylor was able to communicate with his wife and family in many ways, even though unable to talk.

16. The family developed methods of communication which were very satisfying and fulfilling to them and to Theodore Taylor.

17. Theodore Taylor, despite his ALS, remained completely mentally intact and mentally alert.

18. Prior to the disconnect, plaintiff derived continuing recognition, gratitude, love, comfort, affection, moral support, solace and companionship from her husband because of his presence in the household and their ability to communicate.

19. This situation was stable and would have continued for the lifetime of Theodore Taylor but for the disconnect.

20. The ALS did not affect Theodore Taylor's mental acuity, his ability to love and give affection, or to communicate (other than by way of oral communication). The ALS also did not affect his facial grimaces, smiles and contortions.

21. Plaintiff was present and witnessed the disconnect incident of July, 1982, as well as the resuscitation efforts.

22. Plaintiff, sensing something was wrong, was the first to discover that Theodore Taylor was suffering from lack of oxygen and was turning blue. She immediately alerted the nurse.

23. Plaintiff observed all the emergency efforts being exerted on behalf of her husband, including 15 minutes of cardiac pulmonary resuscitation (C.P.R.).

24. This incident had a profound impact on plaintiff, causing her significant grief, anguish, shock, and terror, manifesting in hysteria, extended crying, emotional disturbance and continuing anguish and depression.

25. These problems were very acute in the five days following the disconnect and for some time thereafter, but have become less acute.

26. Plaintiff still suffers mentally and emotionally from this incident.

27. Plaintiff is reminded periodically of the incident by seemingly trivial things and often cries for periods of time.

28. Plaintiff believed that she was watching her husband die from asphyxiation, saw her husband struggling for breath, and for several hours she thought he was dead.

29. Plaintiff will continue to be affected by the witnessing of this incident for the rest of her life.

30. Plaintiff provides care for Theodore Taylor on an around-the-clock basis.

31. Plaintiff is devoted to the care of her husband and has no

outside interests, activities or friends.

32. This situation will very likely continue until the death of Theodore Taylor.

33. Plaintiff no longer has communication with Theodore Taylor due to the brain damage brought about by the disconnect. All forms of communication between the couple as previously described are gone.

34. Plaintiff has lost the companionship, comfort, love, affection, moral support and solace, society, communication, and other aspects of the relationship with her husband that they enjoyed before the disconnect. These were lost as a direct and proximate result of the disconnect.

35. Plaintiff's losses are permanent and will continue until the death of Theodore Taylor.

36. Plaintiff has an invalid, unresponsive, severely brain damaged husband for whom she must care on an almost around-the-clock basis but who cannot respond to her in any way.

37..Before the disconnect plaintiff had similar responsibilities in caring for her husband but she received love, gratitude, solace, caring, companionship and communication because her husband was alert and aware of what she was doing.

38. Theodore Taylor's ALS has essentially stabilized. There has been no deterioration in the last two years.

39. Considering the extent of his ALS, Theodore Taylor is in excellent condition with regard to his respiratory system, urinary system and skin care.

40. His brain damage is stable and there will be no improvement.

41. Theodore Taylor receives an extraordinary level of close love and care from his wife and family which, in the main, accounts for his good condition.

42. Given this quality of care, along with the improvements in the equipment available to plaintiff for Theodore Taylor, his prospects for surviving have improved markedly from what would have been the case a few years ago.

43. Given the continued level of care he receives, a reasonable life expectancy for Theodore Taylor is 7 and 1/2 years.

44. Plaintiff has suffered the loss of her husband's care, love, affection, comfort, society, communication, companionship, solace and moral support from the time of the disconnect, July 1982, to the present time, January, 1986, a total of 42 months.

45. Plaintiff will continue to be deprived of her husband's care, comfort, society, love and affection, communication, companionship, solace and moral support for the duration of his life.

46. Plaintiff has suffered general damages for both the emotional distress sustained by witnessing the disconnect and for the loss of her husband's care, comfort, society, companionship, solace, moral support and love and affection.

47. Any finding of fact herein deemed to be a conclusion of law shall be considered to be a conclusion of law.

Conclusions of Law

1. The Court incorporates and adopts, in so far as appropriate

to the issues herein, the conclusions of law entered in *Theodore M. Taylor v. The United States (Taylor I)*, Case No. C 83-2854 RPA, January 27, 1984.

2. The claims of plaintiff herein are separate and independent of the claim of Theodore Taylor and the Court makes findings and conclusions as appropriate to this case based on the evidence as of time of trial.

3. Under the doctrine of collateral estoppel, the Court is not bound by the findings in *Taylor I* with respect to the life expectancy of Theodore Taylor.

4. The government has stipulated to liability for all consequences of the disconnect.

5. The damages sustained herein by plaintiff are the consequence as well as the proximate result of such liability.

6. The Joint Pre-Trial Statement submitted by the government on behalf of both parties did not have the effect of binding plaintiffs to a prayer of $200,000.00 for damages.

7. The government is in no way prejudiced by the Court allowing plaintiffs to pray for judgment in excess of $200,000.00 according proof submitted at trial.

8. Plaintiff has sustained general damages for her injury from witnessing the disconnect in the sum of $100,000.00.

9. Plaintiff is entitled to general damages in the sum of $400,000.00 for all loss of consortium in the past and that likely to be suffered in the future.

10. The defendant United States of America is therefore liable

to plaintiff for total damages in the amount of $500,000.00.

11. Any conclusion of law herein deemed to be a finding of fact shall be considered to be a finding of fact.

It is so ordered.

Dated: January 22, 1986

Robert P. Aguilar
United States District Judge

Appendix 5

In the United States District Court for the
Northern District of California

Ida J. Taylor,
Plaintiff

vs. No. C-85-0076
United States of America,
Defendant.

Excerpt of Proceedings

Before Honorable Robert P. Aguilar, Judge
Court Trial
Thursday, March 6, 1986

Reported By:
Jane Stuller,
Pro Tem Court Reporter

The Court: All right, the Court has received, read and considered all of the papers in connection with this matter and has heard the oral argument of counsel.

The court has before it a motion entitled motion for reconsideration and post-trial relief. In effect, what the government is seeking is a motion for a new trial, or in the alternative, remittitur in two other figures.

The court has considered those alternative motions by the

government, and the court feels that the government should have proceeded in in this matter, one, by objecting to the findings of fact and conclusions of law of the court and suggesting what they have considered or would have considered, more appropriate findings of fact and conclusions of law and, thereafter, if not satisfied with the court's ruling upon that application, to make a motion for a new trial; because what, in fact, the government is objecting to here is the findings of the court and the conclusions of law of the court.

And as I read those objections, see them in the motion for reconsideration, they are three in number: One, the government is objecting to the fact that the court permitted the plaintiff to augment the amount of her prayer from two hundred thousand dollars to one million dollars or more as was prayed for in argument at the conclusion of the trail; and, Two, that this court had made the law of the case incorporating the findings and conclusions with Taylor one, but the transcript which is exhibit 1 in evidence in this motion makes it clear that the court did not accept those findings in Taylor one, which related to the life expectancy of the deceased, Mr. Taylor.

That is further borne out in the findings for Taylor two in finding number one and number two, specifically number two where the court says finding of fact, numbers thirty, thirty-three and thirty-four from the above-referenced *Taylor one* case are note adopted as findings in this case, *Taylor two*.

Findings, thirty, thirty-two and thirty-four relate to the life expectancy of the decedent. They were, therefore, specifically not accepted by the court; and the court, as shown in the transcript, says it wasn't going to. And that was before the taking of any testimony in the case, at which time the court said it did not require opening statements.

Further, the court said it was going to adopt findings to the extent or insofar as they were appropriate to the issues the court was facing in *Taylor two*.

The next issue which the government raises is the issue for the first time in this case as to whether or not the limitation of two hundred fifty thousand dollars as a maximum cap for general damages under micra would be applicable in this case.

Now, the court finds that the claims of Mrs. Taylor as set forth in her complaint in Taylor two and as the evidence came in as a matter of proof, gave rise to evidence of two claims, two separate and distinct claims: one claim is that which is known as a claim for damages, or loss of consortium or society.

The court approached that claim under the theory and doctrine of the California case of *Lee versus Yellow Cab* and its progeny and other cases following.

The second claim that the court felt that Mrs. Taylor had properly pled and had properly shown evidence to the court's satisfaction by a preponderance was a claim under Dillon versus Legg for that suffering, mental suffering that she sustained as a result of the observing the results of injuries sustained by her husband as a proximate cause of the negligence of the defendants.

With respect to the negligence that the court found to be the cause of the injury which was the proximate cause of the two claims and losses sustained by Mrs. Taylor, the court will refer counsel further to its findings of fact and conclusions of law, and in particular, those in Taylor two where the court makes a finding that the government has admitted liability.

I thought I had it at hand, but maybe I have it — Oh, yes, it's

conclusion number four. The government has stipulated to liability for all consequences of the disconnection.

Nowhere was there any evidence or argument presented to the court as to how or in what manner the government intended to limit the intent of its stipulation as to liability or as to what theories of recovery it was limiting its liability.

The court did not approach this as a medical malpractice or medical negligence claim, but only one of common law negligence, a failure of a duty of care which was owed to a person such as Mr. Taylor and as Mrs. Taylor, his spouse, and a percipient witness of what had occurred as a result of that negligence. Accordingly, the court made its findings with respect to general damages as a result of that.

Good cause appearing therefore, the court denies the government's motion of reconsideration and post-trial relief.

Now, Mr. Sterns, you will present the appropriate order?

Mr. Sterns: Yes, I may.

Could I just ask one point of clarification? In the court's analysis, you mentioned the case of *Lee versus Yellow Cab* in connection with the consortium. I think, Your Honor, you may have meant Rodriguez. Lee is a comparative negligence case. We brief Rodriguez.

The Court: No, there is another *Lee versus Yellow Cab* way back in Nineteen Hundred —

Mr. Sterns: You're way ahead of me there.

The Court: — 1958 or '59

Mr. Sterns: All right, I just wanted to be sure.

The Court: San Francisco Case, by the way.

Mr. Sterns: Thank you, Your Honor.

The Court: But I also have in mind the Rodriguez case.

Mr. Sterns: We'll prepare the proposed order, and the government have any objection to the proposed costs that we will file?

The Court: Well, you have to file your costs.

Mr. Sterns: Well, there has been no motion established, and I—

Mr. Wolfe: I filed and objection to the one item.

Mr. Sterns: Another issue, okay.

The Court: But those are settled by the clerk. Thank you.

Federal Rule of Civil Procedure 8 (c)

(c) **Affirmative Defenses**. In pleading to a preceding pleading, a party shall set forth affirmativly accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, staute of limitations, waiver , and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

No. 87-1010

In the Supreme Court of the United States

OCTOBER TERM, 1987

IDA J. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that the government did not waive its defense that a California statute limits petitioner's noneconomic damages in this medical malpractice case.

1. Petitioner is the wife of a serviceman who sustained permanent brain damage when his ventilator became disconnected at an Army hospital in California (Pet. App. 18-19). Petitioner sought damages under the Federal Tort Claims Act (28 U.S.C. 1346, 2671 *et seq.*) for loss of consortium and emotional distress resulting from her husband's injury. The government stipulated to liability for the incident (Pet. App. 19).

The district court awarded petitioner $400,000 for loss of consortium and $100,000 for negligent infliction of emotional distress (Pet. App. 19). The government then moved for a reduction of the damages under Cal. Civ. Code § 3333.2 (West 1970), which limits noneconomic damages to $250,000 in an action for professional negli-

gence against a health-care provider. The district court denied the motion on the ground that petitioner's claims were based on ordinary "common law" negligence rather than professional negligence (Pet. App. 19).

The court of appeals reduced the judgment to $250,000 (Pet. App. 26). The court of appeals held that petitioner's suit was an action for professional negligence because the Army hospital had a professional duty to prevent petitioner's husband from becoming disconnected from his ventilator (*id.* at 24). The court concluded, therefore, that Section 3333.2 of the California Civil Code limits petitioner's noneconomic damages to $250,000.

The court of appeals held that the government did not waive reliance on the California statute by not pleading the statute in its answer to petitioner's complaint. The court reasoned that Section 3333.2 was a limitation on liability rather than an affirmative defense that must be pleaded under Fed. R. Civ. P. 8(c) (Pet. App. 25). In addition, the court of appeals noted that petitioner was not prejudiced by the government's failure to plead the damages limit set forth in Section 3333.2 (Pet. App. 25).

2. The court of appeals' decision in this fact-specific case is correct. Moreover, the decision does not squarely conflict with any other federal decision. Thus further review is not warranted.

a. Petitioner first contends (Pet. 8-10) that the court of appeals ignored binding state precedent (*Pressler* v. *Irvine Drugs, Inc.*, 169 Cal. App. 3d 1244, 215 Cal. Rptr. 807 (1985)) in holding that the government did not waive reliance on Section 3333.2. This contention is wrong for the simple reason, stated by the court of appeals (Pet. App. 24a-25a), that, in a federal-court action, federal law governs the question whether a defense was waived by failing to comply with the pleading requirement of Fed. R. Civ. P. 8(c). See *Ingraham* v. *United States*, 808 F.2d

1075, 1079 (5th Cir. 1987); *Jakobsen* v. *Massachusetts Port Authority*, 502 F.2d 810, 813 (1st Cir. 1975).[1]

b. Petitioner next argues that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Ingraham* v. *United States, supra*. The court there concluded that a state statute limiting liability was an affirmative defense to be pled pursuant to Fed. R. Civ. P. 8(c) (808 F.2d at 1078), and that failure to so plead waived the defense where "unfair surprise" would otherwise result. The court noted that the plaintiffs in *Ingraham* were prejudiced by the government's failure to raise at or before trial the statutory limit on damages because, had plaintiffs been aware of it earlier, they "would have made greater efforts to prove medical damages which were not subject to the statutory limit" (*id.* at 1079). Thus the court held that the government had waived reliance on the statute. At the same time, however, the court made clear that such a failure to plead a limitation of liability would not necessarily result in its waiver where no prejudice resulted (*ibid.*, citing *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986)).[2]

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[1] In any event, the issue whether Section 3333.2 *must* be pleaded as an affirmative defense was not presented in *Pressler*. In *Pressler*, the defendant did plead the statutory provision as an affirmative defense and the California appellate court simply noted this fact in its description of the case's procedural history (169 Cal. App. 3d at 1247, 215 Cal. Rptr. at 808).

[2] Petitioner relies as well (Pet. 13) on *Jakobsen* v. *Massachusetts Port Authority*, 520 F.2d 810 (1st Cir. 1975). In that case, the court also concluded that a statutory limitation on liability should have been pled as an affirmative defense, and found the defense waived on the particular facts before it. At the same time, however, the court made clear its view (*id.* at 813) that "[d]oubtless, when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed."

In this case, the court of appeals noted (Pet. App. 22-23) that Section 3333.2 defines "professional negligence" broadly as "a negligent act or omission to act by a health care provider in the rendering of professional services." In light of the sweeping scope of this definition, the court concluded that petitioner's husband's "injuries unquestionably arose from professional negligence" (Pet. App. 25). This is true regardless of how the ventilator became disconnected (*id.* at 24).[3] Accordingly, the court correctly reasoned (*id.* at 25) that application of Section 3333.2 to this case required resolution of no factual issues and, unlike the situation in *Ingraham*, petitioner was not prejudiced by the government's delay in raising the statutory limitation.

There is admittedly an inconsistency between the opinions in this case and *Ingraham* as to whether statutes limiting damages in malpractice cases are an affirmative defense under Rule 8(c). Compare Pet. App. 25 with 808 F.2d at 1079. This difference, however, does not constitute a conflict in the holdings of the two courts. On the contrary, they applied the same test to decide whether the government waived reliance of the statutory limits—*i.e.*, whether the plaintiff was prejudiced. Thus we believe that this case does not present an issue calling for resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

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[3] The court's holding that Section 3333.2 applies in this case is a matter of state law not warranting review by this Court.

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SUPREME COURT OF THE UNITED STATES

IDA J. TAYLOR *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1010. Decided April 4, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner's husband was left comatose when he was disconnected from his ventilator while in a military hospital. She brought suit against the Government under the Federal Tort Claims Act for personal injury as a result of negligence, and won a judgment of $500,000 for emotional distress and loss of consortium. In a post-judgment motion, the Government argued for the first time that Cal. Civ. Code § 3333.2 limits noneconomic damages to $250,000 in this case. The District Court rejected this claim, which it noted had not been raised before or during the trial. The Ninth Circuit reversed, holding that the Government had not waived the application of the state statute by failing to plead it, and therefore the damages recovered by petitioner must be limited to $250,000. *Taylor* v. *United States*, 821 F. 2d 1428 (CA9 1987).

Under the accepted interpretation of Rule 8(c) of the Federal Rules of Civil Procedure, any matter "constituting an avoidance or affirmative defense" to the matters raised in the plaintiff's complaint must be pleaded in a timely manner or it is deemed to be waived. As a matter of California law, the state statute at issue in this case is understood to be an affirmative defense. The Ninth Circuit held, however, that this determination is not binding on a federal court because the proper characterization of the statute in this case, which was brought in federal court, is a matter of federal procedural law. The Court ruled that this statute is a mere limitation of liability, rather than an avoidance or an affirmative defense. This conclusion conflicts with the decisions of two

other Courts of Appeals. In *Ingraham* v. *United States*, 808 F. 2d 1075, 1078–1079 (CA5 1979), the Fifth Circuit held that an identical statutory limitation on damages recoverable in the State of Texas is an affirmative defense that is waived under the Federal Rules by failure to plead it in a timely manner. And in *Jakobsen* v. *Massachusetts Port Authority*, 520 F. 2d 810, 813 (CA1 1975), the First Circuit held that a statutory limitation on liability is an affirmative defense under Rule 8(c). Both courts also ruled that any such statute is deemed to be waived when the application of the statute is not raised during the trial but instead is raised for the first time after the trial, on appeal. I would grant certiorari to resolve this conflict among the Courts of Appeals.